No. SC84130

IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI,

Respondent,

v.

VICTOR M. CRUZ,

Appellant.

Appeal from the Circuit Court of Jackson County, Missouri
Sixteenth Judicial Circuit, Division 10
The Honorable John C. Andrews, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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This appeal is from convictions of assault in the second degree, § 565.060, RSMo 2000, and armed criminal action, § 571.015, RSMo 2000, obtained in the Circuit Court of Jackson County, for which appellant was sentenced to a $2500 fine and three years of imprisonment, respectively. After an opinion by the Court of Appeals, Western District, this Court took transfer of the case. Therefore, jurisdiction lies in the Supreme Court of Missouri. Mo.Const. Art. V, § 10 (as amended 1976).

STATEMENT OF FACTS

Appellant, Victor M. Cruz, was charged by amended information with assault in the second degree, § 565.060, RSMo 2000,[1] armed criminal action, § 571.015, and unlawful use of a weapon, § 571.030.1(4) (L.F. 13-14). On June 13-14, 2000, the cause went to trial before a jury in the Circuit Court of Jackson County, the Honorable John C. Andrews presiding (Tr. 59, 215).

The sufficiency of the evidence to support appellant's convictions is not in dispute. Viewed in the light most favorable to the verdicts, the following evidence was adduced. The victim, James Mygatt, was appellant's stepfather (Tr. 149). Mr. Mygatt had raised appellant since appellant was twelve years old (Tr. 149-50).

On May 6, 1998, Mr. Mygatt, who had recently been divorced from appellant's mother, called appellant and argued with him over an earlier incident involving his mother (Tr. 195-96). Appellant decided to talk to Mr. Mygatt in person, so just before 10:00 p.m., he drove to Mr. Mygatt's house and waited for him to come home (Tr. 187, 196, 247). When Mr. Mygatt arrived, he and appellant got into an argument (Tr. 187, 217, 233).

Then appellant went to his car, pulled out a shotgun, and loaded it (Tr. 187, 197). Mr. Mygatt said to appellant several times, "Did I ever do you wrong?" (Tr. 219, 233). Appellant pointed the shotgun at Mr. Mygatt, threatened to kill him, and then fired a shot

[1] All citations are to RSMo 2000, unless otherwise noted.

into the ground (Tr. 187). Appellant yelled, "I'll kill all you mother fuckers" and fired a second shot, striking Mr. Mygatt in the foot (Tr. 187, 197-98, 217-18, 234-36).

Two neighbors heard the shots and came to see what was going on, and appellant got in his car and began backing down the road (Tr. 221-23, 237-38). Appellant stopped in front of the two neighbors, raised his shotgun off the passenger seat, said, "Do you want some," and then drove away (Tr. 221-23, 237-38).[2]

Police officers arrived at the scene at about 10:10 p.m. (Tr. 248). Officers found no evidence of gunfire at the crime scene except two spent shotgun shells, one live shotgun shell, and a hole in the ground which appeared to have been made by a shotgun shell (Tr. 252-53). The two neighbors who heard the argument and heard and saw the shooting only heard a total of two shots fired (Tr. 229, 236).

Mr. Mygatt was taken to the hospital, and incurred $14,000 in medical bills for treatment for his foot (Tr. 154-55).

Appellant was arrested at about 10:20 p.m. that night (Tr. 167, 170). While he was being handcuffed, he blurted out, "I shot my stepfather because he was hitting my car's windshield" (Tr. 175). The next day, appellant gave a statement to police, stating that Mr. Mygatt had fired about seven shots at him from two guns, and appellant had only fired the shotgun at him to keep him away (Tr. 196-202).

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[2] Threatening the neighbors with the gun formed the basis of the charge of unlawful use of a weapon (Tr. 274-75).

At trial, out of hearing of the jury, Mr. Mygatt refused to testify and said he would rather be jailed for contempt than give testimony which might get appellant thrown in jail (Tr. 140-46). When the prosecutor called him to testify, he tried to take the Fifth Amendment, and then claimed that he did not remember what happened (Tr. 147-48, 150).

Appellant did not take the stand or call any witnesses (Tr. 262-63).

At the close of the evidence, instructions, and arguments of counsel, the jury found appellant guilty of assault in the second degree and armed criminal action, and recommended a fine for the assault and three years of imprisonment for the armed criminal action (Tr. 296, L.F. 37-38). The jury acquitted appellant of the count of unlawful use of a weapon (Tr. 296-97, L.F. 39). The court sentenced appellant to a fine of $2500 for the assault, and three years of imprisonment for the armed criminal action (Tr. 305, L.F. 45-47). This appeal follows.

ARGUMENT

The trial court did not plainly err in submitting to the jury Instruction 9, the verdict direct for armed criminal action, because the instruction was not required to include the mental state of "knowingly" in that under the plain terms of § 571.015, the armed criminal action statute, and § 562.021.2, which supplies culpable mental states, the only mental state required for armed criminal action is that of the underlying felony.

Appellant claims that the trial court plainly erred in submitting to the jury Instruction 9, the verdict director for armed criminal action, because the instruction did not require the jury to find that appellant "knowingly" used a deadly weapon in committing the underlying offense of assault in the second degree (App.Sub.Br. 15). Appellant argues that the jury might have found that he only acted recklessly with respect to whether the shotgun he used was a deadly weapon (App.Sub.Br. 16). He claims that he is entitled to the extraordinary remedy of complete discharge due to this alleged instructional error (App.Sub.Br. 16).

A. Facts

Appellant was charged with assault in the second degree, armed criminal action, and unlawful use of a weapon (L.F. 13-14). Appellant's conduct of shooting his stepfather in the foot formed the basis of the charges of assault and armed criminal action (Tr. 273-74, L.F. 26-29). Appellant's conduct of gesturing with his shotgun at two neighbors as he drove away from the crime scene formed the basis of the charge of unlawful use of a weapon (Tr.

274-75).

During the trial, appellant contested whether he gestured at the two men with the shotgun (Tr. 228, 231, 242-43, 287). Appellant also argued that when he shot Mr. Mygatt, he was not reckless, but it was purely an accident (Tr. 287). However, appellant never contested the fact that he took a shotgun to Mr. Mygatt's house, loaded it during the argument with Mr. Mygatt, and fired it twice at the ground, hitting Mr. Mygatt in the foot (Tr. 138-39, 283-87).

The jury was given Instruction 7, the verdict director for assault in the second degree, which required the jury to find that appellant, "recklessly caused physical injury to James Mygatt by means of discharge of a firearm." (L.F. 26, Resp.App. A9). The jury was also given Instruction 9, the verdict director for armed criminal action, which read as follows:

> As to Count II, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that defendant committed the offense of assault in the second degree as submitted in Instruction No. 7, and
>
> Second, that defendant committed the offense by or with or through the use, assistance or aid of a deadly weapon,
>
> then you will find the defendant guilty under Count II of armed criminal action.
>
> However, unless you find and believe from the evidence beyond a

reasonable doubt each and all of these propositions, you must find the defendant not guilty of armed criminal action.

If you do find the defendant guilty under Count II of armed criminal action, you will assess and declare the punishment at:

Punishment for a term of years fixed by you but not less than three years.

(L.F. 29, Resp.App. A11). Appellant did not object to this instruction on the ground that it left out the appropriate mental state (Tr. 265-66).

The jury returned guilty verdicts on assault in the second degree and armed criminal action (Tr. 296, L.F. 37-38).

B. Standard of Review

Because appellant failed to object to Instruction 9 on the grounds he now raises on appeal, his claim is not preserved for review. State v. Barnett, 980 S.W.2d 297, 303 (Mo.banc 1998) (to be preserved for review, objection at trial must be specific, and point on appeal must be based on same theory); Supreme Court Rule 28.03. Therefore, his claim is only reviewable for plain error resulting in manifest injustice.

C. Under the plain terms of § 571.015, Instruction 9 was proper

In determining whether Instruction 9 was proper, this Court must first determine whether the trial court committed any error at all in omitting the mental state of "knowingly" from the instruction.

Section 571.015.1 defines the elements of the offense of armed criminal action as

follows:

> any person who commits any felony under the laws of this state by, with, or through the use, assistance, or aid of a dangerous instrument or deadly weapon is also guilty of the crime of armed criminal action

Section 571.015.1, RSMo 2000 (Resp.App. A8). In other words, the two elements of the offense of armed criminal action are:1) the commission of any felony, and 2) doing so through the use, assistance, or aid of a deadly weapon. State ex rel. Westfall v. Ruddy, 621 S.W.2d 42, 43 (Mo.banc 1981); State v. Danikas, 11 S.W.3d 782, 789 (Mo.App. W.D. 1999); State v. Gott, 784 S.W.2d 344, 346 (Mo.App. S.D. 1990) ("elements" of armed criminal action are 1) commission of a felony 2) through use of a dangerous instrument or deadly weapon).

This statute does not expressly set out a mental state for armed criminal action. However, it does, by its plain terms, prescribe the mental state with regard to the first element of the offense, the commission of any felony. Under its plain terms, the state must prove all the elements of the underlying felony in order to convict a person of armed criminal action. The elements of the underlying felony necessarily include the mental state of that underlying felony. Therefore, in requiring the state to prove the commission of "any felony" as an element of armed criminal action, the statute requires the state to prove the mental state of the underlying offense. Accordingly, a mental state for the first element of armed criminal action is prescribed by § 571.015, and is the mental state of the underlying felony.

The statute does not proscribe a mental state for the second element of armed criminal action. Therefore, as will be fully discussed below, no mental state is required as to this element of the offense.

Thus, under the plain language of § 571.015, Instruction 9 was proper. As to the first element of armed criminal action, Instruction 9 required the jury to have found every element of assault in the second degree, including the mental state of that offense. As to the second element of armed criminal action, Instruction 9 did not prescribe a mental state, which is consistent with the statute. Therefore, there was no error, plain or otherwise, in the trial court's submission of Instruction 9 to the jury.

D. There is no merit to appellant's claim that § 562.021, RSMo 2000, mandates the insertion of the mental state of "knowingly" into the armed criminal action statute

Appellant, relying on MAI-CR 3d 332.02, and § 562.021, argues that the mental state of armed criminal action must be "knowingly" (App.Sub.Br. 19-20, 23).

The pattern instruction for armed criminal action, MAI-CR 3d 332.02, provides as follows:

> As to Count ___, if you find and believe from the evidence beyond a reasonable doubt:
>
> First, that defendant (committed) (is guilty of) the offense of [*name of the "underlying" felony*], as submitted in Instruction No. ___, and

Second, that defendant **knowingly** committed that offense (by) (or) (with) (or) (through) the (use) (or) (assistance) (or) (aid) of a (dangerous instrument) (deadly weapon),

then you will find the defendant guilty under Count ___ of armed criminal action.

(emphasis added). Notes on Use 2 provides: "Since the statute does not prescribe a culpable mental state, the crime is committed if the defendant acted 'knowingly.' The mental state of 'recklessly' is not sufficient. Section 562.021, RSMo Supp. 1997."

Admittedly, Instruction 9 did not follow MAI-CR 3d 332.02 or Notes on Use 2 in that it omitted the mental state of "knowingly." However, where a pattern instruction conflicts with the substantive law, it should not be followed. State v. Carson, 941 S.W.2d 518, 520 (Mo.banc 1997) ("If an instruction following MAI-CR3d conflicts with the substantive law, any court should decline to follow MAI-CR3d or its Notes on Use."). Respondent submits that this is such a case.

1. History of § 562.021 and cases applying it to the armed criminal action statute

The language of the armed criminal action statute has not changed since the statute's effective date of 1979.

Before 1993, § 562.021, RSMo 1986, provided, in pertinent part, as follows:

2. Except as provided in section 562.026 if the definition of an offense does not expressly prescribe a culpable mental state, a culpable mental state is

nonetheless required and is established if a person acts purposely or knowingly or recklessly, but criminal negligence is not sufficient.

(Resp.App. A6).

Several cases arose in the Court of Appeals in which the defendant raised a claim concerning the appropriate mental state for the commission of the crime of armed criminal action. In applying the older version of § 562.021, the Court of Appeals first looked to whether the armed criminal action statute "expressly" set forth a mental state. *See, e.g.,* State v. Rowe, 838 S.W.2d 103, 109 (Mo.App. E.D. 1992); State v. Hernandez, 815 S.W.2d 67, 71-72 (Mo.App. S.D. 1991); State v. Miller, 657 S.W.2d 259, 261 (Mo.App. E.D. 1983). Finding that it did not "expressly" (or "specifically") set out a culpable mental state, the Court of Appeals held that the mental state for armed criminal action must be "purposely, knowingly, or recklessly," in accordance with § 562.021.2. *See, e.g.,* State v. Rowe, 838 S.W.2d at 109; State v. Hernandez, 815 S.W.2d at 71-72; State v. Miller, 657 S.W.2d at 261.

These cases held that because the mental state of armed criminal action could be any of three different mental states, the mental state of the underlying felony would be incorporated into armed criminal action, as long as the mental state was purposely, knowingly, or recklessly. *See, e.g.,* State v. Rowe, 838 S.W.2d at 109 (mental state of armed criminal action was reckless where underlying felony was involuntary manslaughter); State v. Hernandez, 815 S.W.2d at 72 ("By definition, armed criminal action incorporates all the elements of the underlying felony.").

Thus, under the pre-1993 version of § 562.021, the Court of Appeals cases required the state to prove two things to convict of armed criminal action. First, the state must prove all the elements of the underlying felony. Second, the state must prove that the person committing the underlying felony purposely, knowingly, or recklessly used a dangerous instrument or deadly weapon to do so.

Notwithstanding these decisions by the Court of Appeals, this Court reserved judgment on the issue of the proper mental state to assign a charge of armed criminal action. This Court noted:

> It remains an open question whether a culpable state of mind is required to prove the armed criminal action offense . . . . The open question, however, is whether the statute requires "a culpable state of mind of *acting*."

State v. Reynolds, 819 S.W.2d 322, 328, n.8 (Mo.banc 1991) (citations omitted; emphasis in original).

One wrinkle that arose in these cases was whether a person could be found guilty of armed criminal action using a dangerous instrument. Courts looked to the definition of a dangerous instrument, and found that one had to use the item, "with a purpose to cause death or serious injury." State v. Pogue, 851 S.W.2d 702, 706-707 (Mo.App. S.D. 1993). Thus, the courts reasoned, if the underlying felony had a mental state merely of recklessness, and the item used to commit the felony was not inherently dangerous, the item was not used "purposely" to cause death or serious physical injury. Id., *see also* State ex rel. Bulloch v. Seier, 771 S.W.2d 71, 75-76 (Mo.banc 1989) (stating that "Armed criminal action, by

definition, incorporates all the elements of the underlying felony;" in concurring opinion, stating in dicta that ordinary items are only dangerous instruments if used with a dangerous purpose, but weapons are inherently dangerous). In contrast, if the item were inherently dangerous, the conviction of armed criminal action could stand. *See* State v. Rowe, 838 S.W.2d at 109 (underlying felony had mental state of "recklessness," armed criminal action conviction was sustained because the defendant used a gun, "clearly" a deadly weapon.)

Then, in 1993, § 562.021.2 was repealed. The statutory language supplying the mental state of "purposely, knowingly, or recklessly" was gone. Thus, there was no longer any statutory authority for the rationale followed by the Court of Appeals in the pre-1993 cases. However, several cases perpetuated the language of the pre-1993 statute. Virtually without explanation, the cases simply relied on the older cases and said that the offense of armed criminal action requires a culpable mental state of "purposely, knowingly, or recklessly." *See, e.g.*, State v. Bush, 8 S.W.3d 173, 177 (Mo.App. W.D. 1999) (in dicta, "there is longstanding authority that the requisite mental state for armed criminal action is purposely, knowingly or recklessly."); State v. Gilpin, 954 S.W.2d 570, 580 (Mo.App. W.D. 1997) (citing to § 562.021.2 for mental state for armed criminal action, even though crime was committed in 1994).

In 1994, after the repeal of § 562.021.2, RSMo 1986, the Court of Appeals, Western District, decided State v. Jennings, 887 S.W.2d 752 (Mo.App. W.D. 1994). In that case, the defendant claimed that he could not be convicted of armed criminal action where the jury found he only acted "recklessly" in discharging a firearm and killing another man.

Id. at 754. The court noted that § 562.021.2 had been repealed and no similar statute had been enacted in its place. Id. The court found that the plain language of the armed criminal action statute adopted the mental state of the underlying offense, whatever that mental state was. Id. at 755. Accordingly, where the underlying felony had a mental state of recklessness, "The element of recklessness is incorporated into the armed criminal action offense, therefore, reckless behavior also becomes the required culpable mental state to maintain Mr. Jenning's conviction of armed criminal action." Id. The court then sustained the conviction. Id.

Then, in 1997, the legislature enacted new provisions that became part of § 562.021. The language from pre-1993 subsection 2 was altered and reenacted as subsection 3, and an entirely new subsection 2 was added. No changes have occurred since 1997. This current version of § 562.021.2-3 provides:

> 2. If the definition of an offense prescribes a culpable mental state with regard to a particular element or elements of that offense, the prescribed culpable mental state shall be required only as to the specified element or elements, and a culpable mental state shall not be required as to any other element of the offense.
>
> 3. **Except as provided in subsection 2 of this section** and section 562.026, if the definition of any offense does not expressly prescribe a culpable mental state for any elements of the offense, a culpable mental state is nonetheless required and is established if a person acts purposely or

knowingly; but reckless or criminally negligent acts do not establish such culpable mental state.

Section 562.021, RSMo 2000 (emphasis added, Resp.App. A2).

An examination of this statute shows that there are two major changes to the pre-1993 language.

The first change is that one must start with subsection 2 and determine whether the offense prescribes a mental state at all. The offense does not have to "expressly" prescribe a mental state for subsection 2 to apply. Only if the offense does not prescribe any mental state does one reach subsection 3.

The second change is that there is one less mental state listed under subsection 3. So, if a mental state must be added to a statute, the mental state can only be purposely or knowingly. It can no longer be recklessly.

2. Notes on Use 2 to MAI-CR 3d 332.02 conflicts with the plain language of § 562.021.2, RSMo 2000

The pattern instruction relies on § 562.021 for the proposition that the mental state of armed criminal action should be "knowingly." MAI-CR 3d 332.02, Notes on Use 2. Under § 562.021.2, RSMo 2000, if any element of an offense prescribes a mental state, then only that element has a required mental state, and the other elements have none. Therefore, if the definition of armed criminal action prescribes the culpable mental state for either the first or second elements of the offense, then the mental state is required only as to that element of armed criminal action, and no mental state is required as to the other

element of armed criminal action. Section 562.021.2, RSMo 2000.

As explained above, the two elements of armed criminal action are: 1) the commission of any felony, and 2) the use, aid, or assistance of a dangerous instrument or deadly weapon. Section 571.015, State v. Gott, 784 S.W.2d at 346.

Missouri courts have long held that armed criminal action, by definition, incorporates all the elements of the underlying felony. State ex rel. Bulloch v. Seier, 771 S.W.2d at 75-76 ("Armed criminal action, by definition, incorporates all the elements of the underlying felony"); State v. Hernandez, 815 S.W.2d at 72 ("By definition, armed criminal action incorporates all the elements of the underlying felony."); *see also* State v. Hyman, 37 S.W.3d 384, 391 (Mo.App. W.D. 2001) ("By this definition, armed criminal action incorporates all the elements of the underlying felony."). Therefore, armed criminal action, by definition, incorporates the culpable mental state of the underlying felony. Thus, the armed criminal action statute does prescribe a mental state as to the first element of the offense. The mental state is that of the underlying felony. The mental state may not be "expressly" set forth in the armed criminal action statute, but § 562.021.2 does not require the mental state to be "expressly" set forth.

The statute does not prescribe a mental state as to the second element of the offense, the use of a dangerous instrument or deadly weapon. Therefore, under § 562.021.2, no mental state is required for that element.

Because § 562.021.2 provides that, under these circumstances, no mental state is required on the second element of armed criminal action, § 562.021 does not support the

insertion of the mental state of "knowingly" required by Notes on Use 2 to MAI-CR 3d 332.02. Accordingly, insofar as MAI-CR 3d 332.02 requires the addition of the mental state "knowingly" as to the second element of armed criminal action, it conflicts with the substantive law, and should not be followed.

E. Appellant's arguments in support of his claim lack merit

Appellant raises several arguments in support of his claim. An examination of each argument shows that it lacks merit.

1. Section 562.021 applies to elements of the crime, not the "core" of an offense

Appellant argues that the "core" of armed criminal action "is the use of the deadly or dangerous weapon, not the commission of a felony," and therefore "subsection 3 of Section 562.021 applies" (App.Sub.Br. 23). Appellant essentially argues that the second element of armed criminal action is its "core," that this "core" has no prescribed mental state, and therefore he can skip subsection 2 of § 562.021 and immediately apply subsection 3.

Appellant's argument ignores the fact that armed criminal action has two elements, both of which must be proven to convict. Section 562.021 does not concern itself with which concepts a person may feel are at the "core" of the offense; it only concerns itself with elements of the offense. Appellant cannot pretend that the first element does not exist. Appellant must apply § 562.021 as written, analyzing the offense in terms of both of its elements.

Additionally, § 562.021.3 is subordinate to subsection 2; one only reaches subsection 3 after first determining that subsection 2 does not apply. *See* § 562.021.3,

RSMo 2000 ("Except as provided in subsection 2 . . ."). Thus, if subsection 2 applies, subsection 3 does not. Appellant cannot split the elements of armed criminal action, disregard the first element (because it is not the "core"), and, taking the second element alone, argue that it has no prescribed mental state, and thus its mental state must be provided under subsection 3. If any element of armed criminal action has a prescribed mental state, then subsection 2 applies.

Thus, appellant's argument has no merit.

2. Appellant's cases do not support his argument

Appellant claims that armed criminal action cannot change its mental state depending on the underlying offense, because that would make it "a chameleon offense" (App.Sub.Br. 22). Appellant relies on State v. Juarez, 26 S.W.3d 346 (Mo.App. W.D. 2000); State v. Hyman, 37 S.W.3d 384 (Mo.App. W.D. 2001); and State v. Barbee, 822 S.W.2d 522 (Mo.App. E.D. 1991), for the proposition that armed criminal action must keep the same mental state no matter what the underlying felony (App.Sub.Br. 22).

However, the armed criminal action statute requires the jury to find the commission of the underlying felony, including whatever mental state is an element of that underlying felony. All three of the cases appellant cites support this conclusion. State v. Juarez, 26 S.W.3d 346, 363 (Mo.App. W.D. 2000) (armed criminal action can be based on any felony, and requires proof of an additional element of use of a deadly weapon); State v. Hyman, 37 S.W.3d 384, 391 (Mo.App. W.D. 2001) ("armed criminal action incorporates all the elements of the underlying felony"); State v. Barbee, 822 S.W.2d 522, 527 (Mo.App. E.D.

1991) (armed criminal action requires proof of underlying felony plus additional element of use of a weapon). None of these cases hold that the mental state of armed criminal action must be static; they merely hold that armed criminal action is a separate offense from its underlying felony. State v. Juarez, 26 S.W.3d at 363, State v. Hyman, 37 S.W.3d at 392-93, State v. Barbee, 822 S.W.2d at 527. Therefore, appellant's reliance on those cases is misplaced.

3. There is no merit to appellant's argument that the mental state of "knowingly" applies to both elements of armed criminal action

Although not clear from his Point Relied On, appellant apparently argues that the mental state of "knowingly" must apply to both elements of armed criminal action. (App.Sub.Br. 25-29). Appellant appears to argue that if the jury acquitted him of "knowing" conduct, and only convicted him of "reckless" conduct, then he did not commit the underlying felony "knowingly," and his conviction of armed criminal action cannot stand.

This logical error is not supported by statute or cases. Under the plain terms of § 571.015, "**any** felony" can form the basis of an offense of armed criminal action. The mental state of the underlying felony could be strict liability, purposeful conduct, or anything in between. But, under appellant's logic, if the underlying offense has a mental state of anything less than knowing, it cannot support a conviction of armed criminal action. No construction of the armed criminal action statute can support this argument; the plain language of the statute controls. State v. Rowe, No. 83880 (Mo.banc January 8, 2002) slip op. at 4 (when the words are clear, courts do not apply rules of statutory construction, but

simply apply the plain meaning of the law).

Thus, even if the jury concluded that appellant acted recklessly when he fired the shotgun into Mr. Mygatt's foot, that felony can support a conviction of armed criminal action.

F. Even assuming § 562.021 required the second element to have the mental state of "knowingly," appellant did not suffer manifest injustice, because he did not dispute the fact that he knew the shotgun was a deadly weapon

Assuming that there were some merit to the argument that the first element of armed criminal action incorporates the mental state of the underlying felony, and the second element of armed criminal action has the mental state of knowingly, appellant's point still fails, because the mental state of the second element was undisputed.

At trial, appellant argued that he accidentally shot Mr. Mygatt, and that he was not reckless (Tr. 287). Thus, he did contest his mental state under the first element of armed criminal action, the commission of the felony.

But appellant never contested his mental state under the second element of armed criminal action, use of a dangerous instrument or deadly weapon. Throughout the trial, he never disputed the fact that he took a shotgun to Mr. Mygatt's house, loaded it, and shot it twice at the ground (Tr. 138-39, 283-87). He never claimed that he did not know that the object in his hands, the shotgun, was a deadly weapon. Thus, his mental state under the second element was undisputed.

Therefore, even if the first element of armed criminal action has the mental state of

the underlying felony, and the second element has the mental state of knowingly, appellant suffered no manifest injustice from the omission of the mental state of knowingly from Instruction 9, because he did not dispute that he knew he was using a deadly weapon. State v. Wurtzberger, 40 S.W.3d 893, 898 (Mo.banc 2001) ("it is well-settled that a trial court's failure to correctly instruct the jury on an element of the crime charged that was undisputed at trial cannot result in manifest injustice.").

Appellant argues that the jury acquitted him of unlawful use of a weapon, and therefore the jury must have thought that he did not commit any part of armed criminal action knowingly (App.Sub.Br. 25-27). However, the conduct that formed the basis of the unlawful use of a weapon count occurred after the assault, when two neighbors said appellant stopped his truck in front of them, gestured with the shotgun, and said, "Do you want some?" (Tr. 221-23, 237-38, 274-75). Appellant vigorously disputed this testimony; cross-examining the witnesses on their memories of appellant showing the gun to them after the shooting, and arguing that the men did not really remember anything after the shooting, and could not even identify him (Tr. 228, 231, 242-43, 287). He basically asserted that the incident never happened. In contrast, he never disputed that he knew that the shotgun was a deadly weapon, and that he shot Mr. Mygatt with it. Thus, there is no merit to appellant's highly speculative claim that the jury's acquitting him of unlawful use of a weapon means that the jury found that he did not know that the object he loaded and fired twice was a deadly weapon. Therefore, appellant's point has no merit, and must

fail.[3]

[3] Appellant argues, in footnote, that any interpretation of law which is inconsistent with MAI-CR 3d 332.02, Notes on Use 2, violates due process if applied to him (App.Sub.Br. 23-24, note 3). Appellant cites Rodgers v. Tennessee, 532 U.S. 454 (2001) in support of this proposition. In Rodgers, the Court held that the defendant was not deprived of due process when the state court abolished the "year-and-a-day" common-law rule in his case, even though it deprived him of a defense to the charge of murder, because the abolishing of the rule was not "unexpected and indefensible" by reference to the law as it existed before the decision Id. at 462-63. Similarly, in the case at bar, applying the plain language of existing statutes to correct an error in a Note on Use cannot be "unexpected and indefensible." Nor can it violate appellant's due process rights to do so when the only "change" made is to an element of the offense which was undisputed at trial.

CONCLUSION

The armed criminal action statute, § 571.015, has two elements; 1) the commission of any felony, 2) through the use of a dangerous instrument or deadly weapon. The statute, by its plain terms, prescribes the mental state of the first element, which is the mental state of the underlying felony. Neither the statute nor anything in § 562.021 requires a mental state as to the second element. Therefore, the trial court did not err, plainly or otherwise, in giving Instruction 9 to the jury, and appellant's conviction and sentence must be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND OF COMPLIANCE

I hereby certify:

1. That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 5,918 words, excluding the cover, this certification and the appendix, as determined by WordPerfect 9 software; and

2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and

3. That a true and correct copy of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 28th day of February, 2002, to:

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APPENDIX